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JAMES H. ROBERTS,
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No. 94.

ON THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1898.

No. 94

THE SARANAC LAND AND TIMBER COMPANY,
Plaintiff in Error,

against

JAMES A. ROBERTS, as Comptroller of the State of New York, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN C. DAVIES,
Attorney General.

THEODORE R. HANCOCK,
Counsel for Defendant in Error,
Albany, N. Y.

ALBANY:
THE BRANDOW PRINTING CO.,
DEPARTMENT PRINTERS.
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Plaintiff in Error,

v.

JAMES A. ROBERTS, as Comptroller of the State of New York,
Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This case is brought into the Supreme Court of the United States on a writ of error directed to the Circuit Court of the United States for the Northern District of New York. The action was commenced by The Saranac Land and Timber

Company against James A. Roberts, as Comptroller, to test the title of the State of New York to 7,500 acres of land in the town of Harrietstown, Franklin county, N. Y. (Pages 2 and 3.) It is a part of the same township of land involved in the case of Benton Turner, plaintiff in error, against the People of the State of New York, reported in 168 U. S. 90. The Turner case related to 7,500 acres of land in the southeast quarter of Township 24, Great Tract 1, Macomb's Purchase; and the present case relates to 7,500 acres of land in the northwest quarter of Township 24, Great Tract 1, Macomb's Purchase. The land in dispute is a part of the Forest Preserve of the State, and it is made a part of the duties of the Board of Fisheries, Game and Forests to maintain and protect the same and to defend actions involving the State's title. (Chap. 31, General Laws, art. XII; Banks & Brothers' Revised Statutes, 9th ed., vol. 1, pp. 917, 918; People ex rel. Forest Com. v. Campbell, 152 N. Y. 51.)

The plaintiff was organized on or about December 24, 1894, under the laws of the State of New Jersey, evidently for the purpose of attempting to secure title to this land and commencing this action of ejectment. (Page 19.) The record recites that one of the purposes of its organization was the bringing of this suit in the United States Circuit Court. All of its property is located in the State of New York. (Page 20.)

The State Comptroller commenced to advertise himself in possession of the land upon December 22, 1894, and continued the advertisement for three weeks. As before stated, this corporation was organized December 24, 1894, and the suit was commenced January 29, 1895. (Page 17.) The land in controversy was sold for nonpayment of taxes and conveyed to the State upon four different tax sales, viz.: 1877, 1881, 1885, and 1890. (Pages 17, 18.)

(1) The first certificate was issued by the Comptroller October 18, 1877; the deed was executed by the Comptroller to the People of the State of New York, June 9, 1881, and recorded in Franklin county clerk's office, June 8, 1882; "which deed was in the usual form of deeds made by the Comptroller upon sale of lands for taxes, and purported to convey to the People of the State of New York the northwest quarter of Township 24, Great Tract 1, Macomb's Purchase." This sale was for unpaid taxes for the years 1866 to 1870. It was a sale of the whole northwest quarter of Township 24, Great Tract 1, Macomb's Purchase." (Page 17.)

(2) Upon the tax sale of 1881 to the People of the State of New York, two certificates were issued, each dated November 23, 1881. One conveyed the northwest one-quarter of this same Township 24, excepting 1,000 acres at the northwest corner, and also excepting 1,215 acres of water; the other certificate conveyed this 1,000 acres contained in the northwest corner of the northwest one-quarter of Township 24. The deed executed in conformance with these tax sales and the certificates so issued, was dated October 31, 1884, and recorded in Franklin county clerk's office March 5, 1887. These sales were for unpaid taxes of years 1871 to 1876, inclusive. (Page 17.)

(3) Upon the tax sale of 1885 two certificates were issued to the People of the State of New York by the Comptroller under date of December 29, 1885. The first of these certificates conveyed the northwest one-quarter of Township 24, excepting 1,000 acres at the northwest corner; and the other certificate showed the sale by the Comptroller to the People of the State of 1,000 acres in the northwest corner of the northwest one-quarter of Township 24. The deed executed to the People of the State in pursuance of these certificates was executed February 15, 1890, and recorded in Franklin

county clerk's office March 3, 1891. This tax sale was for unpaid taxes for the years 1852 to 1855, inclusive, and 1877 to 1879, inclusive.

(4) The land was again sold by the Comptroller for unpaid taxes in 1890, and a certificate issued to the People of the State of New York, conveying the northwest one-quarter of said Township 24, excepting 1,000 acres at the northwest corner. This certificate is dated September 23, 1890, and the sale was for unpaid taxes of the years 1861 to 1865, inclusive. (Page 18.)

It thus appears that the owners of the land commenced to make default in the payment of taxes in the year 1852, and that the amount due and owing the State for unpaid taxes upon the premises aforesaid is very large. No attempt has ever been made to redeem from any of these tax sales.

In the year 1894 this foreign corporation was organized for the purpose of commencing an action in the United States Circuit Court to recover from the State the possession of the lands aforesaid without any suggestion that there has ever been any attempt made to pay the taxes or that there is any intention of so doing in case of a recovery. The plaintiff seeks to recover the 7,500 acres of land upon two theories: 1. That chapter 448 of the Laws of 1885 and chapter 711, Laws of 1893, limiting the time within which actions of this character should be commenced, are unconstitutional; and 2. That certain irregularities which are alleged to have been incident to these tax sales constitute defects of a jurisdictional nature.

POINTS.

I.

The constitutionality of chapter 448 of the Laws of 1885 and chapter 711 of the Laws of 1893 as statutes of limitations is no longer an open question.

Upon the 9th day of June, 1885, the Legislature of the State of New York passed an act amending the general tax laws of the State. The amendatory statute reads as follows:

AN ACT to amend chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of nonresidents and to provide for the sale of such lands for unpaid taxes."

Passed June 9, 1885; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of nonresidents, and to provide for the sale of such lands for unpaid taxes," is hereby amended so as to read as follows:

§ 65. Such conveyances shall be executed by the Comptroller under his hand and seal, and the execution thereof shall be witnessed by the Treasurer or Deputy Comptroller, and all such conveyances that have been heretofore executed by the Comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been

recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the Comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale shall, six months after this act takes effect, *be conclusive evidence that the sale and all proceedings prior thereto*, from and including the assessment of the land and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, *were regular and were regularly given*, published and served according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto, and all other conveyances or certificates heretofore or hereafter executed or issued by the Comptroller, shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based, shall be subject to cancellation, as now provided by law, on a direct application to the Comptroller or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

§ 2. The provisions of this act are hereby made applicable only to the following counties, namely: Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren and Washington, but shall not affect any action, proceeding or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly

made within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

§ 3. This act shall take effect immediately.

The validity and constitutionality of this particular statute is res adjudicata.

People v. Turner, 117 N. Y. 227.
People v. Turner, 145 N. Y. 451.
Turner v. New York, 168 U. S. 90.

Similar statutes have been repeatedly construed as not in contravention of the Federal Constitution and as valid for the purpose of limiting the time within which actions similar to this shall be commenced.

Geekie v. Kirby-Carpenter Co., 106 U. S. 379.
Terry v. Anderson, 95 U. S. 628.
In re Brown, 135 U. S. 701.
Williams v. Supervisors of Albany, 122 U. S. 163.
Townsen v. Wilson, 9 Penn. 270.
Bronson v. St. Croix Lumber Co., 44 Minn. 251.
Coulter v. Stafford, 48 Fed. Rep. 266.
L. & R. Imp. Co. v. Barden, 45 Fed. Rep. 706, 711.
Ensign v. Barse, 107 N. Y. 329.
Ostrander v. Darling, 127 N. Y. 70.
Allen v. Armstrong, 16 Iowa, 508.
Smith v. Cleveland, 17 Wis. 563, 571.
Freeman v. Thayer, 33 Me. 83.
Raley v. Guinn, 76 Mo. 270.
Pillow v. Roberts, 13 How. 472.

The record of this case establishes the following facts:

1. The owners have neglected to pay any taxes for at least thirty years.

2. The property was sold for nonpayment of taxes in 1877; the certificate was issued October 18, 1877.

3. The property was deeded to the State June 9, 1881.

4. The deed was recorded June 8, 1882.

5. There apparently was never any effort made by any owner to pay the taxes, or to redeem, after the property was sold.

6. This corporation, the plaintiff, secured title to the property on or about December 24, 1894, and commenced this suit January 25, 1895, over seventeen years after the first sale for the nonpayment of taxes, and the certificate of sale was issued to the State, and over twelve years after the first tax deed was recorded.

Under the provisions of the statute quoted, the certificates issued to the State and deeds recorded had become conclusive evidence of the regularity of the proceedings long before the commencement of the action, and properly so. The tax laws of the State of New York give ample opportunity to every property-owner to pay his taxes or to redeem after his property has been sold.

(a) If the owner felt himself aggrieved by any imposition of taxes, he could appear before the assessors on the third Tuesday of August and make his grievances known (Laws of 1851, chap. 176, and Laws of 1857, chap. 536), or he could appear before the board of supervisors at their next meeting. (Laws 1851, chap. 176, § 5.)

(b) The Comptroller was compelled by statute to wait for two years from the first day of May following the year when the taxes were assessed, before commencing to advertise and sell. (Laws 1855, chap. 427, §§ 4, 33.)

(c) The Comptroller was compelled by statute to advertise for ten weeks in newspapers of the county, in addition to publication in the State paper; also for twelve weeks successively in all the newspapers in the State designated for printing the Session Laws. (Laws 1855, chap. 427, §§ 34, 41.)

(d) The owner or occupant, or any person interested in the land, may redeem the same at any time within two years after the last day of the sale. The Comptroller must, at least six months before the expiration of the two years, cause notices to be published at least six weeks successively, and completed at least eighteen weeks before the expiration of the two years allowed for redemption, which notices are to be published in each county of the State, specifying each parcel of land unredeemed, the amount to be paid, and that the land will be conveyed to the purchaser unless redeemed by a certain day. If no person redeems the land at the expiration of the time specified, the Comptroller is authorized to convey the same to the purchaser, which vests in the grantee "an absolute estate in fee-simple." If there is any person in occupancy of the land, or any part thereof, at the time of the expiration of the two years, the grantee, within two years of the expiration of the time to redeem, must serve a written notice on the occupant allowing the occupant, or any other interested person, six months' additional time to redeem. (Laws 1855, chap. 427, §§ 50, 61, 63, 68, 70.)

The parties interested in these lands, without making any effort to pay the taxes or to redeem from the sales which had been made to the State, have waited until the land has become greatly enhanced in value and has been appropriated by the State as a part of its Forest Preserve, and now attempt to vacate the tax sales and regain the property sold, on account of alleged irregularities in the proceedings. The taxes which

have accumulated since the owners of the property first omitted to pay the taxes assessed, including the interest down to the present time, would amount to about $30,000. It is apparent that there is no equity in the case of the plaintiff in error; that no attempt has been made by the owners of this property to protect their rights, or to pay the taxes which have accumulated on this property, of which they must, as a matter of law and of fact, had full knowledge, and that an attempt is now being made to deprive the State of its property upon technicalities.

It is respectively submitted that the statute of 1885, and similar statutes of this State have been passed for the express purpose of limiting the time within which actions of this nature can be commenced, and that the constitutionality of such laws is no longer a question of dispute.

Laws 1885, chap. 448.
Laws 1893, chap. 711, § 12.

The latter section reads as follows:

"Sec. 12. Effect of former deeds.— Every such conveyance heretofore executed by the Comptroller, county treasurer or county judge, and all conveyances of the same lands by his grantee or grantees therein named, which have for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the Comptroller, that shall have remained in force for two years after the last day allowed by law for redemption from such sale, shall be conclusive evidence that the sale and proceedings prior thereto, from and including the assessment of the lands, and all notices required by law to be given previous to the expiration of the time allowed for redemption, were regular and were regularly

given, published and served according to the provisions of all laws directing and requiring the same, or in any manner relating thereto, but all such conveyances and certificates, and the taxes and tax values on which they are based, shall be subject to cancellation on direct application to the Comptroller, or in an action brought before a competent court therefor by reason of the payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid, or by reason of any defect in the proceedings affecting the jurisdiction upon constitutional grounds."

II

The defects complained of by the plaintiff in error were simply irregularities, and not of a jurisdictional nature.

The learned counsel for the plaintiff in error cites various cases in which certain defects are held to be jurisdictional when considered without reference to statutes of limitations prescribing the time within which actions shall be brought to set aside tax sales and conveyances, or to recover land sold for the nonpayment of taxes. The distinction between jurisdictional, as used in a direct action without the intervention of a statute of limitations or curative statute, and as used in connection with such a statute, is clearly pointed out in Ensign v. Barse, 107 N. Y. 346.

Defects Complained of by Plaintiff in Error.

First. It will be found that the principal requests for rulings upon questions of law (pages 12, 13, 23, 24) and the principal assignments of errors (pages 32, 33) are based upon the following alleged defects, to-wit:

That at the tax sale of 1877 the land in controversy, the northwest quarter of Township 24, was sold to the State for the unpaid taxes of 1866, 1867, 1868, 1869, 1870; that in 1866 and 1867 this northwest quarter was assessed and taxed as one parcel of 7,500 acres; that in 1868, 1869 and 1870 two parcels were assessed, viz.: (A) The northwest quarter, excepting 1,000 acres lying in the northwest corner, and also excepting 1,215 acres of water. (B) 1,000 acres lying in the northwest corner of the northwest quarter.

It is to be noted

1. That it is not claimed that the taxes were levied or assessed by the wrong town or ward.

2. It is not claimed that any of the taxes were paid.

3. The sale was concededly for unpaid taxes.

4. The taxes were regularly assessed.

5. No attempt was ever made to redeem.

6. No complaint was made to the assessors or board of supervisors.

7. No action was commenced for the purpose of vacating the tax sale or conveyance.

8. It is not claimed that the notices required by law were not regularly given, published and served.

It is now urged, twenty years after the sale, that the form and manner of sale was improper.

The counsel, to sustain his contention, relied in the court below principally upon two Special Term decisions made by the same judge. (Turner v. Boyce, 11 Misc. 502; Marsh v. Ne-ha-sa-ne Park Association, 18 id. 314.)

The reasoning of the learned judge in these two cases, as far as applicable to the case now before the court, has been overruled.

Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 36.

The facts in this case were almost identical with the one now under consideration.

In the case of Marsh v. the Park Association an entire tract of land was assessed and taxed as a whole for each one of four years, and the taxes returned unpaid to the Comptroller. The tax upon the northeast quarter of the tract was then paid for two of the years, leaving the taxes of two years against the whole tract unpaid, and the taxes of all four years unpaid as against the whole tract, except the northeast quarter. The whole tract was then sold for the unpaid balance of the taxes of all four years. The court, in its opinion, says:

"The Comptroller's sale was made in 1843, and was irregular and could have been vacated if it had been seasonably attacked. Prior to the statute of 1885, the Comptroller's deed was only presumptive evidence of the regularity, and, consequently, of the validity of the sale." (Laws 1855, chap. 427, § 65.)

"The return to the Comptroller of the unpaid taxes for the years 1836, 1837, 1838 and 1839 shows the assessment to have been upon the entire township number 38, containing 20,000 acres, except certain designated parts thereof, which either were not embraced in the assessment, or upon which the taxes had been paid. Among the excepted parcels for the years 1836, 1837 was the northeast quarter — 5,000 acres — which quarter embraces the *locus in quo*, upon which the taxes for 1836, 1837 were paid before return was made to the Comptroller.

"But the taxes upon the northeast quarter for the years 1838, 1839 were unpaid, and the Comptroller, therefore, had the right to sell the quarter. But as the township was wild forest land, with no visible allotments into the respective

parcels of the several owners thereof, the northeast parcel was taxed as part of the larger parcel, from which it was not visibly separated. This was permissible. Upon other portions of the larger parcel the taxes of 1836, 1837 were unpaid, and also the taxes for 1838, 1839. The Comptroller sold the larger parcel, embracing the northeast quarter, and thus the *locus in quo* for all the unpaid taxes for the years 1836, 1837, 1838 and 1839.

"Under the laws then existing, the owner of the northeast quarter could not have redeemed it by paying the amount properly chargeable upon it, but would have been obliged to pay the proportion of the unpaid taxes upon all the parcels which his acreage bore to the whole acreage, and as that amount was increased by the taxes of 1836, 1837 upon the other parcels, the owner of the land would have been obliged to pay more than he owed. The sale, therefore, was invalid, and, no doubt, it would have been so held if it had been seasonably attacked. (People v. Hagadorn, 104 N. Y. 516.) * * *

"But the taxes of 1838, 1839 were not paid, and the sale was for such unpaid taxes. The Comptroller had jurisdiction to make that sale, and ought to have observed the statutory regulations then in force. He made the sale, and it is now challenged because he did not observe the statutory regulations, but disregarded them by selling this land in a parcel which embraced other lands upon which the taxes for four years — 1836, 1837, 1838 and 1839 — were unpaid.

"Thus, the form and manner of the sale are now attacked. That means that the Comptroller, in making the sale, abused his jurisdiction as to the form and manner, or erred in exercising it, nothing more. The unpaid taxes were like a judg-

ment, and the Comptroller's sale is like a sheriff's sale upon execution, which may be vacated if not made in proper form and manner. But the owner, like the judgment debtor, may waive the irregularities. Neither can get rid of the tax or judgment except by paying it, and it may not be worth his while to take the trouble to move when the successful result of his motion will still leave the tax or judgment unsatisfied. It is obvious that these irregularities are not jurisdictional, in the sense that they lie at the foundation of the Comptroller's power to sell, or that they take it away from him altogether, but only in the sense that his power to sell in this form and manner may be challenged, and such sale set aside. (Ensign v. Barse, 107 N. Y. 329.)

"This is very different from a sale where there are no taxes unpaid. The one cannot be made at all, and the other ought to be made in due form and manner. The one cannot be cured, the other ought to be, and after a reasonable lapse of time it should be regarded as cured if the owner meantime makes no objection. It is proper to have evidence of this waiver, and this the Comptroller's deed, two years after its record, affords.

"In this case the time allowed for the owner to complain expired, and the owner did nothing. The statutes declare in effect that his day has gone by, and that the Comptroller's deed is, therefore, conclusive evidence in the material facts which the plaintiffs now seek to controvert."

Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 36, 39, 40.

In the case of Ensign v. Barse, 107 N. Y. 329, we find the same defects as are complained of by the plaintiff in error in this case. These points were distinctly raised in the brief of

the appellant's counsel, which we find in the bound volume of cases. Counsel for the appellant in his brief upon the appeal urged that the tax sale "was void for the reason that the taxes of four separate years were blended in one sale," and further, that "two distinct parcels of land owned in severalty, situate on the same lot, assessed together every year as non-resident lands, one piece being fifty acres, and the other being 150 acres; the owner of the fifty acres, before the tax sale, paid his taxes thereon, for all the years except 1867. The owner of the 150 acres did not pay his taxes for any of those years. The Comptroller sold the whole 200 acres together, for the taxes remaining unpaid on both pieces."

The Court of Appeals held that these irregularities, as well as a large number of others commented upon at great length by the counsel for the appellant, did not render the tax sale void, and were not defects of a jurisdictional nature.

Ensign v. Barse, 107 N. Y. 329.

We have called attention in our first point not only to the adjudication of the courts relating to chapter 448 of the Laws of 1885, but also to numerous other cases holding the validity of curative statutes specifying the time limit within which actions shall be brought for the purpose of setting aside tax sales, or recovering possession of lands sold for nonpayment of taxes; also to the proposition that numerous cases can be cited by counsel attacking tax sales where the effect of statutes of this kind have not been taken into consideration. The criticism made by the plaintiff in error is directed to the alleged irregular procedure on the part of the Comptroller in selling the land; it is not claimed that he did not have the power and jurisdiction to make a sale, but that his procedure

in selling was not in accordance with statute. The uniform lines of decisions bearing upon short statutes of limitations relating to actions of this character is to the effect that where the taxing officers have the power and right to act, and their procedure is wrong, the Legislature has power to do retrospectively the same that it could have done antecedently.

It may be stated as an indisputable proposition that a departure from the strict letter of a statute cannot be said to be a jurisdictional defect, in a constitutional sense, which, had it been directed by statute, would not have rendered the statute constitutional, and that a curative statute may validate acts which the Legislature might originally have authorized, and limit the time within which actions to set aside tax sales based upon irregularities shall be commenced.

Ensign v. Barse, 107 N. Y. 339–346.
People v. Turner, 117 N. Y. 238, 239.
People v. Turner, 145 N. Y. 451.
People ex rel. Flower v. Bleckwenn, 55 Hun, 169.
Matter of Lamb, 51 Hun, 633.

In this case the land was properly assessed, default was made in the payment of taxes concededly due, the Comptroller had the power to sell, and the only fault found is with the Comptroller's method of procedure in making the sale. The only objection appears to be that the Comptroller bunched different taxes together, and that, as a result, some of the land was sold for taxes that were not legally due upon it. As we have before stated, this is the precise question that was passed upon by the New York courts in the cases of Ensign v. Barse, 107 N. Y. 329, and Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 36.

The United States courts will follow the decisions of the State courts in the construction of the State statutes relating to the forms of assessments, and methods of procedure in making sales.

Palmer v. McMahon, 133 U. S. 660.
Amy v. Dubuque, 98 U. S. 470.
Lamborn v. County Com., 97 U. S. 181.
Harpenday v. The Dutch Church, 16 Pet. 455.
Green v. Lessee of Neal, 6 Pet. 58.
De Wolf v. Robaud, 1 Pet. 476.
Catheart v. Robinson, 5 Pet. 263.
Bergman v. Bly, 66 Fed. Rep. 40.
Sandford v. Poe, 69 Fed. Rep. 546.
Christy v. Pridgeon, 4 Wall. 196.
Lane County v. Oregon, 7 Wall. 71.
State Railroad Tax Cases, 92 U. S. 618.
Witherspoon v. Duncan, 4 Wall. 217.

In view of the laws with reference to redemption of lands sold for nonpayment of taxes, it is difficult to spell out any grievance, real or imaginary, sustained by the owners of the land under discussion. Chapter 427, Laws of 1855, contains ample and specific provision and directions for the protection of persons whose lands have been sold for the nonpayment of taxes, if they desire to redeem the same at any time within two years after the last day of sale.

Section 50 permits the redemption of all of the lands sold. Section 51 authorizes the redemption of an undivided part of the land upon payment of a proportionate part of the money realized upon the sale.

Section 52 authorizes the redemption of an undivided share of an undivided part of land sold for taxes.

The sections before referred to, together with sections 53, 54 and 55, were drawn with great particularity, for the purpose of covering apparently every possible contingency that might present itself. It will not be seriously urged that if the owner of the land sold for nonpayment of taxes at the 1877 tax sale had really desired to pay this tax upon the whole tract, or any particular subdivision of the same, ample opportunity would not have been afforded him to do so.

The Comptroller was authorized to bunch the taxes at the tax sale of 1877, and there is fair ground for argument that this was not even an irregularity.

Fellows v. Denniston, 23 N. Y. 437, 438.

Second. The seventh proposition of law, and the seventh assignment of error raised by the counsel for the plaintiff in error (pages 13-34), is as follows: "If the court shall find that at the sale of 1881 the Comptroller treated the land in question as already the property of the State, and struck the same off to the State without giving any opportunity for other persons to bid thereon, then the State acquired no title by reason of said sale, and said sale was not validated or made effectual by chapter 448 of the Laws of 1885, or by chapter 711 of the Laws of 1893." This does not require any extended discussion or consideration because it is based upon the theory that the 1877 tax sale was void, and conveyed no title to the people of the State of New York. Inasmuch as we have demonstrated that the counsel's major premise is wrong, it will not be necessary to repeat the argument already produced.

The Comptroller, in making the subsequent tax sales of

1881, 1885 and 1890, simply followed the statutory provisions directing him to bid in for the State all lands liable to sale for nonpayment of taxes which then belong to the State. Inasmuch as at the time of the 1881 tax sale, the time to redeem had expired, and a deed of the lands in question had been executed to the people of the State, it became the duty of the Comptroller to bid in these lands for the State. The same would be true with reference to the tax sales of 1885 and 1890.

Laws of 1881, chapter 402, section 5, amending section 66, page 547. This section reads in part as follows:

"§ 66. 1. It shall be the duty of the Comptroller, at any tax sale held by him, to bid in for the State all lands liable to sale thereat then belonging to the State or that are then mortgaged to the commissions for loaning certain moneys of the United States; and to bid in for each of the counties of the State all other lands liable to be sold thereat then belonging to said counties, respectively, and also all lands which may have been bid in by or for said counties, respectively, at any tax sale which has not been canceled, or from which said lands may not have been duly redeemed, and to reject any and all other bids which may be made for any or all of said lands." * * *

Third. The plaintiff in error complains that the description "Northwest corner of Northwest quarter, 1,000 acres," and the description, "Macomb's Purchase, Great Tract 1, Township 24, Northwest ¼ Ex. 1,000 a. N. W. corner and 1,215 a. water 5,285 acres," are void for uncertainty. This does not appear to be a point of very much importance, for the reason that the taxes for the years 1866 and 1867 were upon the whole northwest one-quarter of Township 24, and the tax sale of 1877 as well as the deed of 1881 was of the

same northwest quarter, without exceptions or reservations. (Pages 17, 21.)

There, however, is no uncertainty in the description, as the 1,000 acres would be in the form of a square.

Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 40.
Dolan v. Trelevan, 31 Wis. 147.
Bowers v. Chambers, 53 Miss. 259.
Dox ex dem. Hooper v. Clayton, 81 Ala. 391.
Lessee of M. Walsh v. Ringer, 2 Ohio, 328.
Prior v. Scott, 87 Mo. 308.
Enochs v. Miller, 60 Miss. 19.
McCready v. Lansdale, 58 Miss. 877.
Bybee v. Hageman, 66 Ill. 519.
Colcord v. Alexander, 67 Ill. 581.
Mayor v. Brush, 7 Ind. 232.

The counsel for the plaintiff in error appears to have been impressed with the idea that there was some importance to be attached to the fact that there was not 1,215 acres of this tract covered by water in 1895. If we correctly understand the counsel's computation, his measurements in 1895 make the amount under water 1,033.89 acres. (Page 22.) The defendant then gave evidence to the effect that there were about 200 acres more of land under water during years 1866 to 1870 than at the time plaintiff in error made its measurements. (Page 23.) The counsel then stipulated that there was no question of fact for the jury, so it would appear that the description of the 1,215 acres was accurate, and it was concededly accurately located. This was, of course, contained in the tax sale of 1877, and conveyance of 1881.

Fourth. The objection that the court erred in receiving in evidence the certificate of sale issued by the Comptroller

to the People of the State of New York upon the tax sale of 1890 was not well taken, if of any importance. (Page 34.) This sale was for the unpaid taxes 1861 to 1865, inclusive. (Page 18.) This certificate was conclusive evidence of the regularity of the proceedings.

Laws 1885, chap. 448, § 1.
Laws 1893, chap. 711, § 12.

The statute requires a certificate of purchase to be issued to the purchaser.

Laws 1855, chap. 427, § 46.

If there is no redemption the purchaser, his heirs or assigns are entitled to a deed.

§ 63, chap. 427, Laws 1855.

A conveyance of the land by the purchaser is an assignment of the certificate.

§§ 160, 162, Black on Tax Titles.
Pages 329, 330, Blackwell on Tax Titles, 4th ed.

The certificates, especially after the time to redeem expires, creates an estate in the land, the language of the statute being that *the certificate passes to the heirs.*

Laws 1855, chap. 427, § 63.

A certificate of purchase given at a tax sale is equally under the protection of the law as a tax deed, and is just as efficacious as a deed to bar the owner's rights.

Laws 1885, chap. 448.
Laws 1893, chap. 711, § 12.
Laws 1896, chap. 908, § 132.

The owner of a valid certificate of a sale for taxes to whom a deed fatally defective in form shall have been issued, may compel the execution of a proper deed by mandamus.

Page 331, Blackwell on Tax Titles, 4th ed.

§ 205, Black on Tax Titles.

III.

The predecessors in title and interest of the plaintiff in error had ample opportunity to test the regularity of the tax proceedings and sale, and the plaintiff in error cannot now be heard to complain on account of the bar of the Statute of Limitations.

In the case before cited in our second point in which the same defects were alleged as are now complained of by the plaintiff in error, the court said:

"The State was the purchaser at that sale, and if the Comptroller could have canceled the sale, the owner had his opportunity to have his day in court before that officer. The distinction between the case where the State is the purchaser and where an individual is a purchaser is stated by the Court of Appeals in the Turner case, and referred to as unimportant in the opinion in the Supreme Court of the United States in the same case, referring to the case of People v. Roberts, 151 N. Y. 540, since the owner had his opportunity to seek his remedy in the Supreme Court, whether he had one before the Comptroller or not. *The answer to the plaintiff's contention that it is sought to deprive them of their property without due process of law is, that the State gave them, or their grantor, the opportunity to protect their land by due process of law, and they would not resort to it.*"

Marsh v. Ne-ha-sa-ne Park Association, 25 App. Div. 34.

It appears from the record that independent of the terms of the statute establishing the Forest Commission (Chap. 283, Laws 1885), and the Fisheries, Game and Forest Commission (Chap. 395, Laws 1895; chap. 31, General Laws, Banks & Bros.' Rev. Stats., 9th ed., 871), " the lands described in the complaint were in the actual possession of the Forest Commission of the State of New York from 1885 up to the time of the commencement of this action, and that the deeds to the plaintiff were made and executed and delivered at times when the grantor was out of possession of said premises." (Printed record, page 20, side paging 40.)

Moreover the act establishing the Forest Commission placed that body in actual possession of the land in question.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.
People v. Turner, 145 N. Y. 451.
Turner v. New York, 168 U. S. 90.

It is idle for the plaintiff in error here to claim that the former owners of the land did not have ample opportunity to protect their rights, and to secure redress for any alleged grievances.

1. Parties owning or interested in the property were deprived of no constitutional or substantial right. Chapter 176, Laws 1851, section 5, provided that " Any person aggrieved by the assessment of the assessors may appeal to the board of supervisors, at their next meeting, who shall have power to correct and review such assessment."

2. The owners and parties in interest had until the expiration of six months after June 5, 1885, to bring any action they desired to vacate the tax, or any sale, conveyance or certificate made thereunder, or to regain possession of the land. (Laws 1885, chap. 448, § 2.)

The owner was authorized to bring a direct action against the Comptroller to vacate the tax sale or conveyance or certificate of sale made thereunder. (Laws 1885, chap. 448.) If it be conceded that the owner could not apply to the Comptroller for cancellation, he could nevertheless proceed against him by action. If the Comptroller could not be made a judge to try conflicting titles on application by the owner, he could be made a party in an action brought by the owner.

The distinction is plain. The form of proceeding would be different; the relief and result would be the same. Where the State is the purchaser it would be absurd to argue that if the owner is not permitted to apply to the Comptroller for cancellation, but must pursue another method to secure the same relief, he is, therefore, deprived of a constitutional right, and still more absurd to claim that the State would not be bound by an action brought against the Comptroller to the same extent as by an application for cancellation made to the Comptroller. Not only applications, but actions, are referred to in the statute, and it is plain that the word "action" is not used in any narrow or technical sense.

3. The Forest Commissioners could have been made defendants.

Section 11, chapter 283, Laws 1885, provided: "The Forest Commission may bring in the name or on behalf of the People of the State of New York, any action to prevent injury to the Forest Preserve * * * which any owner of lands would be entitled to bring. * * * With the consent of the Attorney-General and the Comptroller, the Forest Commission may appoint attorneys and counsel to prosecute any such action or to defend any action brought against the Commission or any of its members or subordinates arising out of their or his official conduct with relation to the Forest Preserve."

The court held, in People v. Turner, 145 N. Y. 461, that the State held, through the Forest Commission, the actual possession of the lands in question.

About the correctness of this proposition there is no room for question. The Court of Appeals again held this explicitly in 151 N. Y. 540, in the case of People ex rel. Millard v. James A. Roberts, Comptroller. In that case O'Brien, J., says: "If the sale is invalid, his title (the owner's) is not affected, and he may keep and defend his possession, or if put out of possession, regain it by action of ejectment." In this case the land had been bid in for the State at a tax sale and duly deeded to the State by Comptroller's conveyance.

Still more recently, the Court of Appeals, in the case of People ex rel. The Forest Commission v. Campbell, 152 N. Y 51, has held that the possession of that Commission is the possession of the State and they may sue or be sued accordingly. They may defend their possession of the lands in the Forest Preserve.

The court says: "The act (instituting the Forest Commission) clearly contemplates not only actions brought by the Commission in the name of the State, but actions against the Commission or any of its members or subordinates arising out of their official action."

The case referred to in 152 N. Y. reaffirms the doctrine laid down in 145 N. Y. The court says: "The case of People v. Turner, referred to in the opening of this opinion, was affirmed in this court (145 N. Y. 451), and it was then held that the State was placed in constructive possession of the lands in question, through the Comptroller's purchase and deed, but that subsequently it was in actual possession by reason of the creation of the Forest Commission and the powers and duties devolved upon it by the act of 1885. The possession of the Commission is the possession of the State."

Here, then, we have three distinct declarations by the Court of Appeals of the State of New York that the Forest Commission, by virtue of chapter 283 of the Laws of 1885, was placed in the actual possession of the Forest Preserve, empowered not only to bring, but to defend, actions, and the further holding that their possession is the possession of the State.

Chapter 283 went into effect May 15, 1885, and the Validating Act (Chap. 448) went into effect June 9, 1885. We quote from 152 N. Y. 57: "It is necessary to determine the precise powers conferred upon the Forest Commission by chapter 283 of the Laws of 1885. The first section of the act creates the Commission; the seventh section defines what lands shall be known as the Forest Preserve; and the ninth section declares 'the Forest Commission shall have the care, custody, control and superintendence of the Forest Preserve.' The subsequent provisions of the act confer numerous and detailed powers upon the Commission, but those bearing upon this case are to be found in section 11, which provides, among other things, as follows: 'The Forest Commission may bring in the name, or on behalf, of the People of the State of New York any action to prevent injury to the Forest Preserve or trespass thereon; to recover damages for such injury or trespass; to recover lands properly forming part of the Forest Preserve, but occupied or held by persons not entitled thereto, and in all other respects for the protection and maintenance of the Forest Preserve, which any owner of lands would be entitled to bring.' The section proceeds to confer upon the Commission detailed powers in bringing actions for trespass, and then closes as follows: 'With the consent of the Attorney-General and the Comptroller, the Forest Commission may employ attorneys and counsel to prosecute any such action, or to defend any action brought against the Commission, or any of its members or subordinates arising out of their or

his official conduct with relation to the Forest Preserve. Any attorney or counsel so employed shall act under the direction of and in the name of the Attorney-General. Where such attorney or counsel is not so employed, the Attorney-General shall prosecute and defend such actions.'

"It will thus be observed that the Commission is given the absolute care, custody, control and superintendence of the Forest Preserve, and are authorized for its protection and maintenance to bring any and all actions and proceedings which an owner of land would be entitled to institute. The Commission may retain counsel with the consent of the Attorney-General and Comptroller, and, if this is not done, it is made the duty of the Attorney-General to act in their behalf. The act clearly contemplates not only actions brought by the Commission in the name of the State, but actions against the Commission, or any of its members or subordinates arising out of their official action.

"It is difficult, when we consider these sweeping provisions, to believe that it was not the intention of the Legislature to clothe the Commission with the amplest and most complete powers to represent the State in the Forest Preserve.

* * * * * * *

"The case of People v. Turner, referred to in the opening of this opinion, was affirmed by this court (145 N. Y. 451), and it was there held that the State was placed in constructive possession of the lands in question through the Comptroller's purchase and deed, but that subsequently it was in actual possession by reason of the creation of the Forest Commission, and the powers and duties devolved upon it by the act of 1885. The possession of the Commission is the possession of the State."

There was no obstacle in the way to prevent the alleged owner of this property from commencing suit against the Forest Commission at once to test the title of the State to

the lands in question, and to determine the regularity of all proceedings.

4. The owners and parties interested could have commenced suit at once to remove a cloud from the title. The statute provides that all conveyances that had been recorded for two years and all outstanding certificates that had remained in force for two years after the last day allowed by law to redeem, should, six months after the law took effect, be conclusive evidence of regularity, and that all other conveyances should be conclusive evidence of regularity after the expiration of two years from the date of recording, and all other certificates conclusive evidence four years from and after the date of issuing such certificates. The owner or occupant is allowed two years after the date of sale to redeem. Laws 1855, chap. 427, § 50.) As to all cases where the certificate had been issued for four years or the conveyance recorded for two years at the time the law went into effect, an action could have been commenced at once to vacate the certificate or deed as a cloud upon the title. As to all other cases where it appeared that the Comptroller intended to execute a conveyance, an equitable action could be maintained to prevent a cloud upon the title. The Comptroller's intention would be indicated by his advertising for redemption.

Sanders v. Village of Yonkers, 63 N. Y. 489.

Clark v. Davenport, as Comp., 95 N. Y. 477. (In this case the State was the purchaser.)

Hagner v. Hall, 10 App. Div. 581.

Sanders v. Downs, 141 N. Y. 424.

How, then, was the owner deprived of any rights or remedies? He could have appeared before the board of supervisors. He could have redeemed. He could have sued the

Forest Commission in ejectment. He could have brought suit against the Comptroller to cancel the tax sale and conveyance. He could have sued to remove a cloud from his title.

The best that can be said of the grantors of the plaintiff in error is that they have slept on their rights, if any they have had; they have neglected their remedy, and having had the opportunity to have their grievances remedied, and waited until the bar of the statute has fallen, and having stood by and seen the State maintain these lands, and incur the burdens thereof, it seems the plaintiff in error can urge no just complaint against the operation of the law which makes secure the title of the State, a purchaser at the tax sale.

At the time of the pretended sale to the plaintiff in error, neither the owner nor his representatives had any remaining interest in the land. The time for them to take action had expired.

The statutes of the State relating to cancellation by the Comptroller of tax sales were enacted for the benefit of the purchaser. If the sale is invalid, the plainest principles of justice would require that the sale should be canceled by the Comptroller and the money refunded to the purchaser. The owner must pursue another remedy.

People ex rel. Wright v. Chapin, 104 N. Y. 369.

People ex rel. Ostrander v. Chapin, 105 N. Y. 309.

Ostrander v. Darling, 127 N. Y. 70.

People ex rel. Hamilton Park v. Wemple, 139 N. Y. 240.

People ex rel. Witte v. Roberts, 144 N. Y. 234.

People ex rel. Forest Commission v. Campbell, 152 N. Y. 51.

Although it has been suggested by the Court of Appeals that the owner might apply for cancellation, upon more mature consideration it has been determined by that court that the owner should commence a direct action where the conflicting claims of all parties interested can be determined by judicial decree.

The owner has, however, ample protection. He can pay his taxes at the time and in the manner required by law; he can make complaint to the assessors upon grievance day; he is permitted to appear before the supervisors; he is allowed to redeem; if an action is commenced to evict him, he may set forth invalidity of the sale; he is authorized to commence suit by way of ejectment against the Forest Commission; he can sue the Comptroller to vacate the sale and conveyance; he is deprived of no substantial right. But if his action is based upon irregularities he must bring his action within four years after the certificate is issued and two years after the conveyance is recorded.

By the decision in People v. Turner, 117 N. Y. 227, and People v. Turner, 145 id., and other cases, holding that chapter 448, Laws 1885, considered as an act of limitation, afforded the landowner a reasonable opportunity to enforce his rights, the Court of Appeals of New York has established a rule of property in the State of New York which is binding on the United States courts. After such a settled course of decisions upon the act of limitation under consideration, a contrary decision by this court would present a conflict between the State courts and those of the United States productive of incalculable mischief. Many conveyances of land have been made and large sums of money paid therefor and purchasers have entered into possession and made extensive, valuable improvements thereon upon the strength of these decisions. A con-

trary decision by the United States Supreme Court would resurrect thousands of dead claims. The United States courts will adopt the State decisions because they settle the law applicable to the case, and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the State, when applied to the title of lands.

Geekie v. Kirby Carpenter Co., 106 U. S. 385.

Jackson v. Chew, 12 Wheat. 166, 167.

Barret v. Holmes, 102 U. S. 655.

Beauregard v. New Orleans, 18 How. 502.

Suydam v. Williamson, 24 How. 427.

Nichols v. Levy, 5 Wall. 433.

Williams v. Kirtland, 13 Wall. 306.

Sanger v. Nightingale, 122 U. S. 184.

Green v. Neal, 6 Pet. 291.

Harpending v. Dutch Church, 16 Pet. 455.

Porterfield v. Clark, 2 How. 76.

Elmendorf v. Taylor, 10 Wheat. 152.

Bank of Hamilton v. Dudley, 2 Pet. 492.

United States v. Morrison, 4 Pet. 124.

Gaines v. Dunn, 14 Pet. 322.

Bailey v. Magwire, 22 Wall. 215.

IV.

The land in suit having been in the actual possession of the Forest Commission, under a claim of title adverse to the plaintiff's grantor, Frank E. Smith, and his grantors, from 1885, the grants to said Smith, and from him to the plaintiff, were void for champerty.

"Every grant of land shall be absolutely void if at the time of the delivery thereof such land shall be in the actual possession of a person claiming under a title adverse to that of the grantor." (§ 147, art. 2, chap. 1, pt. 2, Revised Statutes.)

Upon the trial of the case "defendant also gave evidence tending to prove that all of the lands described in the complaint were in the actual possession of the Forest Commission of the State of New York from 1885 up to the time of the commencement of this action, and that the deeds to the plaintiff were made and executed and delivered at times when the grantor was out of possession of said premises." (Page 20.)

In addition to this, we have the affirmative decision of the highest court in the State that by virtue of the purchase by the State of the lands upon a tax sale, and by the act creating the Forest Preserve (Chap. 453, Laws 1885), the State was put in the actual possession of the land in question, which is a part of the Forest Preserve.

"That title, by force of the provisions of the act of 1885, became unquestionable upon the expiration of the six months after it went into effect. While we think the people were not bound to take any steps towards actual possession, after the conveyance to them of the land, any doubt upon the subject would seem to be eliminated by virtue of the provisions of the act which created the Forest Commission and placed the Forest Preserve, within which are the lands in

question, in the care, control and supervision of the Commission. The constructive possession which the State had acquired, I think, was made an actual possession by the powers and duties devolved upon the Forest Commission as its representative."

People v. Turner, 145 N. Y. 461.
People ex rel. v. Campbell, 152 N. Y. 51.

It is apparent that the primary object of the incorporation of the plaintiff in error was to buy up a title adverse to that of the State of New York, and then to bring action for the purpose of disputing the State's title. The Champerty Act was passed for the express purpose of preventing proceedings of this character.

Crary v. Goodman, 22 N. Y. 176.
Sands v. Hughes, 53 N. Y. 287.

In the case of Crary v. Goodman, supra, the court says, at page 176: "The Champerty Act is not, like the Statute of Limitations, a mere statute of repose. It was not intended to prescribe a limit to controversies, but simply to prevent the transfer of disputed titles. It did not attempt to determine the disputes, but only to compel their settlement between the original parties."

In the case of Sands v. Hughes, supra, the court says, in drawing a distinction between the statute relating to limitations of actions and champerty, at page 296: "The validity of the title set up by the party in possession is no more at issue in the one case than in the other; the very object of the statute is to prevent the party out of possession from transferring his right to litigate that claim."

"Where a tenant for life has executed a conveyance purporting to be a grant of the fee, and the grantee is in pos-

session, claiming a fee under the grant, after the death of his grantor, this is a possession under claim of title adverse to that of the reversioner or remainderman within the meaning of the Champerty Act (1 R. S. 739, § 147), and a conveyance by the latter is void under said act."

Christie et al. v. Gage et al., 71 N. Y. 189.

The People of the State of New York are in possession, claiming under a *specific title*, and the plaintiff is in no position to assail that title. The statute requires that the party in possession shall claim under a title. The plaintiff in error cannot assail the title of the State, for the reason that the plaintiff's grant is void, being in contravention of the Champerty Laws of the State. The point is, that at the time this corporation was organized, and obtained the grant from Smith, the lands granted were in the actual possession of the State, claiming under a title adverse to Smith and his grantors. As was said in Crary v. Goodman, supra: "The title, and not the possession, was the thing prominently in view, and this led to the more specific language *claiming under a title.* Nothing can satisfy the language of the latter act but the existence of some specific title under which the party claims. This title may be *good* or *bad;* but there must be at least a color of title opposed to the title of the grantor in the deed."

Crary v. Goodman, 22 N. Y. 176.

The proposition is clearly stated in Pearce v. Moore, 114 N. Y. 259. This was an action brought under the provisions of sections 1638 and 1639 of the Code of Civil Procedure to compel the determination of a claim made by the defendant to real estate in the possession of the plaintiff. It appeared from the evidence given upon the trial that the plaintiffs

were in possession, having obtained a quitclaim deed of the property from one Augustus Paul; and that Paul had derived his title from the Comptroller of the State. It further appeared that the defendant in the action produced a perfect paper title to lands back to the People of the State; but that the defendant's deed was obtained while the plaintiff was in possession claiming under the deed given by Paul. The court, quoting the statute, held that the deed to the defendant was void. It was urged upon the part of the defendant, upon the trial of the case, that the Comptroller's deeds to Paul were invalid. The court held that this was of no importance, saying: "It was wholly immaterial, therefore, whether the Comptroller's deeds to Paul were valid or void. As against the defendant, the plaintiffs were entitled to the possession of the land, and as against the plaintiff's deeds defendant's deed was void and the proof failed to establish a title in her. * * * The defendant's deed was absolutely void, and if, as it is claimed, there were such defects in the proceedings to sell the land for taxes as to render void the Comptroller's deed to Paul, the title to the land was still in defendant's remote grantor, and upon that title must be founded all proceedings to recover possession of the land from the plaintiffs."

Pearce v. Moore, 114 N. Y. 259, 260.

It would, therefore, appear that the individuals who organized this foreign corporation for the express purpose of securing a title to the lands in possession of the State under a title adverse to Smith and his grantors, have secured nothing better than a void grant, and a conveyance expressly prohibited by the Champerty Laws of the State of New York. The plaintiff in error has no title to the lands described in the complaint, and cannot maintain this action. Neither Smith, nor the corporation which he organized for the purpose of bringing this suit, have any standing in court, for the

reason that the statute provides that "every grant of land shall be absolutely void if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantors."

1 R. S. (2d ed.), p. 732, § 147.

The defendant, upon the trial of the case, gave evidence that the lands described in the complaint were in the actual possession of the Forest Commission; the possession of the Commission is the possession of the State; this is true not only as a matter of fact, but also as a matter of law. The State claims under a title adverse to the plaintiff in error and its grantors.

People v. Turner, 145 N. Y. 461.
People ex rel. v. Campbell, 152 N. Y. 51.

The promise and covenant to convey the title to the lands in question resulting in the deed to Smith, and from him to the plaintiff, were offensive to section 130 of the Penal Code, in that for a year prior to such promise and covenant, they had not been in possession or taken rents and profits of such lands, and such promises and covenants were misdemeanors, and such criminal acts were important to convey the lands.

"A person who buys or sells, or in any manner procures, or takes or makes any covenant or promise to convey any right or title, real or pretended, to any lands or tenements, unless the grantor thereof, or the person making such covenant or promise, has been in possession, or he and those by whom he claims have been in possession of the same or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such covenant or promise made, is guilty of a misdemeanor."

§ 130, Penal Code.

V.

There is no jurisdiction in the United States Circuit Court to take cognizance of this case.

It is evident that the organization of the plaintiff corporation, and the transfer of this real estate to the corporation, was a mere device to give jurisdiction to the United States Circuit Court, and was a fraud upon that court.

On December 21, 1894, Weed, Turner, Riley, Marsh and Ostrander claimed to have an interest in and title to certain lands in Township 24, Franklin county, N. Y. On December 21st all of them deeded their property to Frank E. Smith, pursuant to an understanding that he would organize a corporation with such land as capital, and return the property to them in the form of stock. He organized the plaintiff, as their trustee, in the State of New Jersey, and admits that such organization in New Jersey had for its purpose the bringing of this suit. The suit was brought immediately afterward, and it does not appear that the corporation ever did anything else. It is plain that the first purpose the corporation undertook to execute was the recovery of the real estate described in the complaint. The plaintiff could have sued in the State courts for the recovery of the premises. But the State courts had decided that the provisions of chapter 448, Laws 1885, were constitutional and valid, and in order to get a construction of this act more favorable to this plaintiff and its stockholders than that made by courts of New York, the alleged owners of this real estate organized the Saranac Land and Timber Company as a New Jersey corporation.

Section 5, chapter 137, United States Statutes, 1875 (18 U. S. Stat. at Large, p. 472), provides: "That if, in any suit

commenced in a Circuit Court * * * it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought * * * that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court or that the parties to said suit have been improperly * * * made * * * for the purpose of creating a case cognizable * * * under this act, the said court shall proceed no further therein." * * *

If the court is satisfied from the facts of this case that the suit does not involve really a dispute and controversy between citizens of different States, then the case comes easily within the lines of the decisions of the United States Supreme Court.

Lehigh Min. & Man. Co. v. Kelly,
160 U. S. 330.

That was a case where a Virginia corporation claimed to own lands in Virginia, and for the purpose of maintaining a suit in the Circuit Court of the United States, organized the Lehigh Min. & Man. Co. in Pennsylvania.

The stockholders of the one corporation organized the other corporation, and the Virginia corporation conveyed its title without valuable consideration to the Pennsylvania corporation. The stockholders in both corporations were the same. Here the stockholders in the New Jersey corporation are the same, except two shares, as the owners of the real estate in the State of New York.

It is unnecessary to point out further similarities between these actions. The Lehigh case contains a thorough discussion of all the cases by a majority and also a minority of the court, bearing on the construction of the statute above cited. (§ 5, chap. 137, U. S. Stat. 1875.)

The court says, page 337: "We cannot shut our eyes to the fact that there exists what should be deemed an *equivalent* to such agreement, namely, the right and power of those who are stockholders of each corporation to compel the one holding the legal title to convey, without valuable consideration, such title to the other corporation." And again, at page 342: "As we have said, that corporation may be required by those who are stockholders of its grantor and who are its own stockholders at any time and without receiving any consideration whatever, to place the title where it was when the plan was formed to wrest the judicial determination of the present controversy from the courts in the State in which the land lies." Between this state of facts and that of the case at bar there is in principle no difference. The fact that one or two shares are held by other individuals, such shares being necessarily disposed of to make a corporation, does not change the case. The courts, in the pursuit of justice, cannot be dissuaged by trifles. "De minimis non curat lex."

Even the dissenters in the court in the Lehigh case admit, if the transaction by which the lands were conveyed involved a trust, that there would be no question but that the purpose was to make a case. There was then an agreement to reconvey these lands to the owners in the State of New York by virtue of the trust which Smith swears existed.

The presumption is that the cause is without the jurisdiction of the court, unless the record shows the contrary.

Lehigh Man. & Min. Co. v. Kelly,
160 U. S. 337.
Grace v. Am. Cen. Ins. Co., 109 U.
S. 255.

The plaintiff seeks to avoid the operation of chapter 137, United States Statutes 1875, against it by the claim that

Weed, Smith and Conway are now stockholders of the plaintiff. The evidence is that the cestui que trust of Smith on the organization were Smith M. Weed, Riley, Turner, Ostrander and Mrs. Marsh, and that Smith issued the stock to them.

The judgment of the United States Circuit Court should be affirmed, and the writ of error dismissed.

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